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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Reply to Opposition of Ringer."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


Stephen T. Yelverton

Enclosure

B:CATON.114

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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REPLY TO OPPOSITION OF RINGER

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.229 (d) and 1.294 (c)(1) of the Commission's Rules, hereby submits this reply to opposition. On September 15, 1993, ORA filed a motion to enlarge the issues against David A. Ringer ("Ringer"). On September 29, 1993, Ringer filed an opposition thereto. In support of its reply to the opposition, ORA submits the following comments.

In its motion to enlarge the issues, ORA noted that Ringer, in his application and integration statement, claimed numerous past residences to be within the 60 dBu contour of his proposed station. However, in an amendment, filed July 16, 1993, Ringer conceded that all but two of those residences are not within the proposed contour. According to Ringer in a declaration, dated July 16, 1993, he discovered the errors by reviewing the joint coverage exhibit. Ringer made no mention of the two past residences claimed in his hearing exhibit.

Ringer represented in his hearing exhibit that he had lived within the 60 dBu contour of his proposed station at two locations in Columbus, Ohio. At the August 31, 1993, hearing, Ringer again represented that these past residences are within the 60 dBu contour of his proposed station. This determination was based upon Ringer looking at an engineering map which contained the proposed contour. He expressed no uncertainty that these past residences are within the proposed contour. According to Ringer, if the engineer drew the contour line correctly, his past residences are within that contour (Ringer Ex. 2, p. 1; Tr. 138-140).

At the conclusion of Ringer's testimony, one of the competing applicants offered a rebuttal exhibit which shows that these residences are at least a kilometer outside the proposed contour (Davis Ex. 5; Tr. 279-281). Ringer conceded shortly thereafter that his hearing exhibit was incorrect in this respect. His concession resulted from a quick call to the engineer who had prepared the joint coverage exhibit (Tr. 276-277).

Based upon the foregoing matters, ORA contended in its motion to enlarge the issues that a substantial and material question of fact is raised as to whether Ringer made knowing and intentional misrepresentations as to his past residences within the 60 dBu contour of his proposed station. In his opposition

to the motion to enlarge, Ringer pleads that a misrepresentation issue should not be specified. However, these arguments are unavailing and unconvincing.

Ringer first contends, at para. 1, that ORA's motion is late-filed because it should have known before the commencement of the hearing that his claim for local residence credit was incorrect. However, Ringer confuses the issue. ORA is seeking the specification of a misrepresentation issue based upon Ringer's untruthful, deceitful, and misleading hearing testimony which was given on August 31, 1993. The motion to enlarge was timely filed within fifteen (15) days of the testimony. See, Section 1.229 (b)(3). ORA is not seeking an issue merely because Ringer's comparative claims in his prior exchanged hearing exhibit are incorrect.

A party, such as ORA, has every right to test at hearing the truthfulness and candor of an opposing applicant, even if they have reason to believe prior to hearing that such applicant may not testify truthfully. See, Maria M. Ochoa, 7 FCC Rcd 1861, 1865, paras. 61-72 (ALJ 1992). If Ringer's arguments are accepted, there would never be a need to conduct a hearing.

Ringer's arguments as to timeliness must also be rejected because he in effect attempts to blame ORA for his derelictions. Ringer appears to suggest, at paras. 1 and 6, that ORA had an obligation to correct his mistakes prior to the hearing. However, Commission policy imposes no such requirement on ORA and Ringer fails to cite to any precedent in support of this novel proposition.

Ringer pleads, at paras. 2 and 6, that he did not make any intentional misrepresentations in his hearing testimony. In support, Ringer only offers his self-serving claim that he make an "honest mistake" that was the result of a "close engineering analysis." However, Ringer fails to acknowledge that this "honest mistake," if it had not been exposed, would have given him a substantial comparative advantage over two of the competing applicants, ASF and Wilburn, who are claiming no local residence. Thus, a motive to deceive can be readily inferred. See, Frank Digesu, 7 FCC Rcd 5459, 5460-5461, paras. 6-22 (1992), a

misrepresentation issue was specified where an applicant claimed comparative credit as to matters which she knew or should have known were incorrect.

Ringer's claim that the location of his past residences is a "very close" engineering question is patently without merit. After Ringer's testimony was challenged at hearing, it took only one quick telephone call to an engineer to confirm that these residences are at least 1 kilometer outside the proposed service contour. No detailed and time consuming engineering analysis was needed.

However, if according to Ringer, the location of his past residences is a "close question," he should have taken sufficient steps to confirm the accuracy of his comparative claims, rather than base his testimony on subjective beliefs. The admitted failure to have an objective engineering analysis performed constitutes gross negligence and wanton carelessness. The Commission held in Golden Broadcasting Systems, Inc., 68 FCC2d 1099, 1106 (1978) that gross negligence and wanton carelessness are the functional equivalent to an affirmative and deliberate intent to deceive. Not surprisingly, Ringer failed to address in his opposition this case precedent.

Ringer contends, at para. 7, that his actions were not "willful," and thus no misrepresentation can be found. However, he misunderstands the term "willful" as that term is used in the Communications Act of 1934, as amended. As noted in Southern California Broadcasting Co., 6 FCC Rcd 4387, para. 5 (1991), the legislative history of the Communications Act demonstrates that Congress intended "willful" to mean that the person "knew that he was doing the act in question ..."

There is no serious question that Ringer knew that his representations were not based upon any objective evidence and had not been verified. Accordingly, his actions were "willful." Moreover, Ringer again ignores Commission precedent in Golden Broadcasting Systems, Inc., which holds that disqualification can be based upon gross negligence and wanton carelessness. If Ringer's actions do not constitute willful gross negligence and wanton carelessness, then nothing would.

In an affidavit, dated September 27, 1993, which was attached to the opposition, Ringer, at paras. 3-4, states that he "believed" that any residence which could receive a listenable signal from his proposed station qualified for comparative credit, regardless of whether the residence is within the 60 dBu contour. After his counsel disabused him of this unfounded notion, Ringer nevertheless somehow "believed" that two of his past residences would still qualify for comparative credit. No explanation is offered in the affidavit as to the basis of this unfounded "belief." Accordingly, Ringer has admitted to gross negligence and wanton carelessness.

Ringer, in his opposition, at paras. 3-4, does offers an explanation, albeit very curious, for his "belief" that at least some of his past residences qualify for comparative credit. According to Ringer, he "carefully" reviewed a map which indicated that some of his past residences, in which he had claimed comparative credit, are "clearly" outside the 60 dBu contour. He then amended his application to correct that mistake, but continued to claim credit for two other residences which are not clearly outside the contour.

Thus, anything which, in Ringer's subjective belief, is close the 60 dBu contour of his proposed station, he claimed for comparative credit, without verifying with an engineer. However, prosecuting FM applications is not like horseshoes, where being close is good enough. Accordingly, Ringer has again admitted to gross negligence and wanton carelessness.

Another basis exists to specify a misrepresentation issue against Ringer. In an affidavit, dated July 16, 1993, at para. 3, which was attached to an amendment, dated July 16, 1993, Ringer explained that his failure to correctly ascertain that his residences are outside the 60 dBu contour of his proposed station resulted from his mistaken belief that the 60 dBu contour of deleted Station WBBY-FM was to be used. See, exhibit 1.

However, in an affidavit, dated September 27, 1993, at para. 3, Ringer conjures up a new and different explanation for his previous failure to correctly ascertain that his residences are outside the 60 dBu contour. According to

Ringer's new explanation, he believed that merely a listenable signal from his proposed station at the residences in question allowed comparative credit. Thus, Ringer's ever shifting and conflicting explanations raise substantial and material questions as to his credibility and therefore require specification of a character issue. See, Maria M. Ochoa, 1866, para. 75.

WHEREFORE, in view of the foregoing, ORA requests that a misrepresentation issue be specified against Ringer based upon, at the least, his admitted willful gross negligence and wanton carelessness and based upon his shifting and conflicting explanations for his actions.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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October 1, 1993

020979.00001 ORA.930

DECLARATION

David A. Ringer, under penalty of perjury, declares as follows:

1. I am an individual applicant for a new FM station at Westerville, Ohio.

2. On July 15, 1993 I met with counsel to prepare for my deposition in the Westerville proceeding. As part of this preparation, I reviewed a copy of the Joint Engineering Exhibit that was prepared on behalf of the applicants. Counsel asked me to review the map that was included with the Joint Engineering Exhibit and that depicted my station's proposed service area and to verify whether my past local residences were, in fact, located within the station's 1.0 m/Vm service contour. At this point, I realized that some of the residences, that were listed in my original application and in the Integration Statement I exchanged in the Westerville proceeding, were not located within the 1.0 m/Vm contour, as shown on the Joint Engineering Exhibit map.

3. Counsel immediately explained to me the significance of this error and, with counsel's assistance, I prepared an amendment to my application. This mistake was completely inadvertant and was a result of a misunderstanding I had concerning which of my past local residences were located in the service area of the proposed station. Counsel had previously explained to me that my residences must be within the service area of the proposed station. Since I was specifying the same antenna site that had been used by the former WBBY-FM, I believed that some of my past local residences were located in areas where WBBY-FM could be received. However, after reviewing the map included with the Joint Engineering Exhibit, I now realize that some of these residences are actually outside of the 1.0 m/Vm contour.

Executed this 16th day of July, 1993.


David A. Ringer

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 1st day of October, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of Ringer" to the following:

The Honorable Walter C. Miller*
Administrative Law Judge
Federal Communications Commission
Room 213
2000 L Street, N.W.
Washington, D.C. 20554

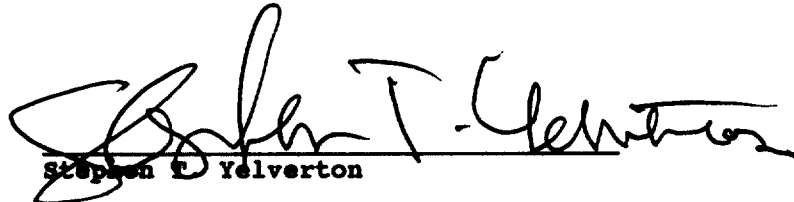
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